SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 12 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

WALTER A. RAYMOND,
1313 Home Savings Building,
Kansas City 6, Missouri,
HArrison 1-2075,
Attorney for Petitioner.

ERNEST RUSSELL and
FRANK MATTES,
707 Pickwick Building,
Kansas City 6, Missouri,
of Counsel for Petitioner.

R. L. Midkiff & Co., Inc., 1108 Oak Street, Kansas City 6, Mo., Harrison 1-2000

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

Respondent has attempted to impugn our statement of facts with the charge of inaccurate and misleading statements of fact (Resp. Br. pp. 1, 2). We cannot, in fairness to this Court and our client permit such charges to go unanswered.

The first such charge is against our statement on page 8 of Petitioner's Statement of the Facts that "plaintiff backed the engine up to the place for delivery to the Union Pacific for repairs" (Resp. Br. pp. 1, 2). In answer we

quote the transcript of the record on appeal in the Supreme Court of Missouri, as follows (Tr. pp. 83-84):

"By Mr. Mattes:

Q. Mr. Simpson, you were interrogated, asked, yesterday by Mr. Ewing, here, with regard to backing the engine up from the oil house to a point in front of the engine dispatcher's office?

A. Yes, sir.

Q. He didn't inquire and I have forgotten to ask you whether you had ever done that before?

A. It had been done every time any time the engine was found defective.

Mr. Ewing: I am objecting to this for two reasons: That it is repetitious, and there is no showing—it is not responsive to the question. He said something that other people did.

The Court: I think it is repetitious, but I will permit him to answer it.

Q. Had you ever done that before?

A. No, I hadn't.

Q. Had you ever been in the crew when it was done before?

A. Yes, sir.

Q. How frequently and over what period of years?

A. Oh, I would say five or six times every year.

Q. And over what period?

A. Every time since I have been going there, twenty years.

Q. When you were with your engineer when this engine had been backed up on those occasions that you have told us about, what occurred?

A. He made the inspection of the engine, and when he did that he turned it in to the dispatcher's office, signed the book, signed the engineer's register.

Mr. Mattes: That is all.

Mr. Ewing: No further questions."

There had been some confusion in the testimony of plaintiff previously but he was put back on the stand and gave the above testimony clearing up such confusion and making it certain that the place where the engine was left on the occasion in question was the usual place for delivery to the Union Pacific for repairs. Respondent selects testimony of plaintiff as conclusive and uncontradicted which plaintiff later repudiated and cleared up when he was recalled to the stand. It is clear that plaintiff was entitled to the more favorable testimony set forth above with all reasonable inferences deducible therefrom and the Respondent may not thus rob him of the benefit thereof and thus deprive him of federal rights under F.E.L.A., *Lavender* v. *Kurn*, 327 U.S. 653, 66 S.Ct. 740, 744, 90 L.Ed. 916; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520.

Respondent next claims that in moving the engine from the place near the oil house to a spot near the dispatcher's office plaintiff was doing the work normally done by the Union Pacific hostlers (Resp. Br. p. 2). We quote plaintiff's testimony on cross-examination on that question (Tr. 45, 46):

"Q. Why didn't you have a hostler—

A. (interrupting) That had been the custom, just like I had done it for twenty years.

* * *

Q. Well, now, the Union Pacific hostler could have moved it from the oil house back there, couldn't he?

A. Yes, he could, but he didn't.

Q. As a matter of fact, you were just doing their work when you did it?

A. Maybe so, but it didn't make any difference, it had been done that way before.

Q. But that is what they were supposed to do to back the thing up there from the oil house?

A. I don't know what they were supposed to do; I am not acquainted with the duties of the U. P. hostlers.

Q. What were the duties of the Union Pacific hostlers?

A. I don't know; I am not acquainted with their rules."

Being interrogated as to who moves the things left at the oil house down to the roundhouse plaintiff testified (l.c. 48):

"Q. Who else besides them does that?

A. It could be hostlers, as I said before; it could have been them.

Q. Regardless of what you want to call them, in any event when you moved that engine beyond the oil house you were doing the work of the president or vice-president of the Union Pacific, or of the hostlers?

A. I just told you that had been the custom ever since I had been there."

We submit respondent's statement that in moving the engine down near the engine dispatcher's office he was doing the work of Union Pacific hostlers is not justified when plaintiff's testimony (and there was no other) was that it had been the custom for the 20 years since he had been there for Respondent's engineer to move its engines down by the engine dispatcher's office near the roundhouse (Tr. 10, 48).

It is further asserted that our statement on page 9 of Petitioner's Statement that at the time of plaintiff's injury the engine was not at the place where repairs were to be made is inaccurate and misleading (Resp. Br. p. 2). Again we quote plaintiff's testimony from the record (Tr. 10, 54, 45):

"Q. You are the plaintiff in this case?

A. I am.

Q. You are suing the railroad for an injury on the job which occurred when?

A. In 1950.

Q. What date in 1950?

A. December 26th.

* * *

Q. Would you describe for the Court and jury what kind of day it was?

A. Well, it was a cold day.

Q. Do you recollect how cold?

A. Oh, I would say maybe 19.

* * *

Q. In other words, you had taken it back down there according to your testimony so they could do some more repair work on it, is that right?

A. Well, they had some repair work to do on it, but they could not have done it outside."

That testimony makes it clear that the engine had to be moved to and into the roundhouse to be repaired. The manner of questioning of Respondent's counsel quoted above is based on the premise that the engine had to be moved into the roundhouse under the sheds and he was contending that was the work of the Union Pacific hostlers.

The record is not clear as to the exact distance the engine had to be moved to the place in the roundhouse where it would be repaired. The aerial photograph of the Union Pacific roundhouse (plaintiff's Exhibit No. 2 at the trial) is reproduced at the end of Respondent's Brief and clearly justifies some inferences. A large turntable is clearly seen in the center of the roundhouse. It is a reasonable assumption that the turntable is long enough to

accommodate the largest locomotive engine on the Union Pacific System. Using that as a measuring stick and noting the number of different railroad tracks arranged around it like spokes in a wheel it becomes readily apparent that this is a huge roundhouse which will accommodate many large locomotives at one time. It is also apparent that there is an outer semicircle of sheds where engines may be taken under cover to be worked on during cold winter weather like that on the day of the accident.

From the above it is readily inferable that the engine in question would be moved over the track it was on, to the turntable and by the turntable moved to a selected track and then moved over one of the tracks radiating out from the turntable into one of the sheds where it would be repaired. The movement of this engine, required to put it in a shed for repairs in this winter weather, is not infinitesimal as Respondent would have the Court believe but was a substantial movement fully justifying our description 'that it was not at the place where repairs were to be made" (Resp. Br. p. 2). We submit Respondent is the party guilty of an inaccuracy when it states the engine at the time of plaintiff's accident "had reached the place of repair" (Resp. Br. p. 7).

In the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35-36, 64 S.Ct. 409, in an F.E.L.A. case the Court said:

> "(6-8) It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs

the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572, 10 S.Ct. 1044, 1049, 34 L.Ed. 235; Tiller v. Atlantic Coast Line R. Co., supra, 318 U.S. 68, 63 S.Ct. 451, 143 A.L.R. 967; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"(9) Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion."

The ruling in the present case is in conflict with the Tennant case and deprives petitioner of a jury trial in violation of the rule of law in the Tennant case.

CONCLUSION.

For all the reasons set forth above and in Petitioner's Petition for Certiorari and supporting suggestions filed herein we respectfully ask that a Writ of Certiorari issue to the Supreme Court of Missouri herein and that appropriate relief be granted petitioner adequate to guarantee his rights under the Boiler Inspection Act, as prayed in the Petition for Certiorari herein.

Respectfully submitted,

WALTER A. RAYMOND,
1313 Home Savings Building,
Kansas City 6, Missouri,
Attorney for Petitioner.

ERNEST HUBBELL and
FRANK MATTES,
707 Pickwick Building,
Kansas City 6, Missouri,
of Counsel for Petitioner.